DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

CIVIL ACTION NO. 47–749

ISBRANDTSEN CO., INC., PLAINTIFF

v.

UNITED STATES OF AMERICA, NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE, ET AL., DEFENDANTS,

FEDERAL MARITIME BOARD, UNITED STATES DEPARTMENT OF AGRICULTURE, INTERVENORS

STATEMENT OF THE FEDERAL MARITIME BOARD AS TO JURISDICTION

In compliance with Rule XII of the Rules of the Supreme Court of the United States, the appellant Federal Maritime Board (an intervening defendant in the court below, pursuant to 28 U. S. C. 2323) submits herewith its statement disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the final order of the three-judge district court entered in this action on March 21, 1951.

OPINION BELOW

The opinion of the District Court for the Southern District of New York has not yet been

reported. A copy of the Court's opinion dated March 20, 1951 is annexed hereto as Exhibit "A".[1]

JURISDICTION

This is a civil action to set aside an order of the Federal Maritime Board and for an injunction forbidding defendant steamship carriers to engage in conduct authorized by the Board's order. Under section 31 of the Shipping Act (46 U. S. C. 830), the procedure in such suits is the same as in similar suits in regard to orders of the Interstate Commerce Commission. Such suits are heard by three-judge district courts by virtue of 28 U. S. C. 2325. The final order of the district court, which set aside the Board's order and granted a permanent injunction, was entered March 21, 1951. A petition for appeal is presented to the district court herewith (May 17, 1951). The jurisdiction of the Supreme Court to review the District Court's final order by direct appeal is conferred by Title 28 U. S. C., secs. 1253 and 2101 (b). The following decisions (pertaining to United States Maritime Commission, the functions of which were transferred to Federal Maritime Board by Reorganization Plan No. 21 of 1950, 15 F. R. 3178) sustain the jurisdiction of the Supreme Court to review the final

[1] CLERK'S NOTE.—The opinion is printed as an appendix to the Statement as to Jurisdiction in No. 134 and is not reprinted in this Statement.

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order of the District Court on direct appeal in this case: *U. S.* v. *American Union Transport,* 327 U. S. 437; *Swayne & Hoyt* v. *U. S.,* 300 U. S. 297; *Isbrandtsen-Moller Co.* v. *U. S.,* 300 U. S. 139; *California* v. *U. S.,* 320 U. S. 577.

QUESTIONS PRESENTED

1. Where the Maritime Commission, acting under section 15 of the Shipping Act (46 U. S. C. 814) had approved the conference agreements of defendant steamship carriers authorizing them to employ a dual rate system of "contract" and "non-contract" ocean freight rates, and the Maritime Board (as the Commission's successor) found in an adversary proceeding instituted by the plaintiff that such dual rate system was not unjustly discriminatory or otherwise unlawful, may a district court set aside the Board's order entered upon such finding, by imputing to it a finding not in fact made or intended—namely, that the spread between the contract and non-contract rates was "arbitrary."

2. Where plaintiff, an ocean carrier operating in competition with defendant carriers in foreign commerce, by complaint filed with the Federal Maritime Board, challenged the lawfulness of the proposed dual freight-rate system of defendant carriers and conferences whereby "contract" rates were to be assessed against shippers contracting to ship exclusively by conference lines and higher non-contract rates were to be assessed

against all others, and the Board entered an order dismissing the complaint, did the District Court exceed its powers or abuse its discretion in setting aside the Board's order and enjoining the use of the proposed dual rate system?

STATUTES INVOLVED

Shipping Act, sections 14 Third, 15 and 22 (46 U. S. C. 812 Third, 814, 821). Copies of these sections are set forth in Appendix B hereto annexed.[2]

STATEMENT

Plaintiff is a common carrier by water in the foreign commerce of the United States between United States North Atlantic ports and ports in Europe. Defendants are two groups of steamship carriers, known as conferences, organized under section 15 of the Shipping Act (46 U. S. C. 814). One conference operates eastbound; the other westbound. The conferences adopt uniform rates and practices which are binding on their member lines. Plaintiff is not a member of either conference, but has the right to join. Plaintiff and defendants are competitors in the North Atlantic Trade.

Federal Maritime Board, established by Reorganization Plan No. 21 of 1950 (15 F. R. 3178) administers the Shipping Act, 1916, as successor

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to the Shipping Board, the Shipping Board Bureau of the Department of Commerce, and the United States Maritime Commission. Under section 15 of the Shipping Act, the approval of the Board (or its predecessors) is required in order to legalize conference agreements between ocean carriers. The agreements of the defendant conferences were approved by the Maritime Commission by orders of January 2, 1948, and August 24, 1948. The agreements thus approved authorized the conferences and their member lines to maintain a system of "contract" and "non-contract" freight rates. The contract rates are lower than the non-contract rates and are available only to shippers who agree to confine their shipments in the trade in question to carriers who are members of the conference. Shippers who do not sign exclusive contracts pay the non-contract rate, which exceeds the contract rate by about 20%.

Since the conferences provide most of the service in the trade, shippers must generally rely on conference lines for a substantial part of their shipping requirements, and in order to avail themselves of the lower "contract" rate scale, many of them sign the conference contracts requiring shipment exclusively via the ships of conference members. Such shippers are thereby precluded from patronizing lines outside the conference.

Plaintiff, an independent (i. e., non-conference) carrier, instituted an action in 1948 in a three-judge district court, Southern District of New York, for a preliminary and final injunction, (1) setting aside the Maritime Commission's orders of January 2, 1948 and August 24, 1948, to the extent that they approved the use of the contract and non-contract rate system by defendant carriers, and (2) prohibiting the use of the contract rate system by the defendant carriers who, in November 1948, announced that it was to be reinstated December 1 of that year on substantially all commodities moving in the affected trades. (It had been in effect on some commodities before the war.) The complaint was based upon the contention that the Maritime Commission's orders approving the conference agreements exceeded the powers of that agency under sections 14 and 15 of the Shipping Act. The district court allowed a preliminary injunction, conditioned on plaintiff's "diligent prosecution" before the Maritime Commission of a complaint challenging the validity of the conference agreements (81 F. Supp. 544, app. dis. 336 U. S. 541).

Plaintiff thereupon filed its complaint with the Maritime Commission, which conducted extensive hearings. The hearing examiner filed an original and a supplemental recommended decision, both unfavorable to Isbrandtsen. The supplemental

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decision, however, made various findings requested by Isbrandtsen, including the following:

> 10. On or about October 1, 1948, respondent Conferences sent notices to all known shippers in the North Atlantic trade that effective November 1, 1948, the exclusive patronage contract rate system would be inaugurated simultaneously on both East and Westbound carriage . . .
>
> * * * * *
>
> 13. The notices sent to the trade on October 1, 1948 by respondent Conferences informed shippers that the proposed contract rates would on and after November 1, 1948 be available only to those shippers who should sign a contract whereby the shipper agreed for the period from November 1, 1948 to December 31, 1949 to effect all his transportation requirements by means of respondent Conferences' lines exclusively.
>
> * * * * *
>
> 14. Shippers were informed that failure to sign such a contract would entail application to their shipments by respondents' lines after November 1, 1948, of noncontract rates which were fixed by means of an arbitrary differential at a level 20% to 30% higher than the currently existing scale.

Before the Maritime Commission had passed upon its examiner's recommendations, it was

abolished and replaced by the Federal Maritime Board which on December 1, 1950, issued its decision, including a finding as follows:

> 3. The use of the dual rate system by the two conferences and their members is not unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, and does not operate to the detriment of the commerce of the United States, and is not in violation of the Shipping Act, 1916, . . .

Simultaneously, the Board entered an order dismissing the complaint.

Isbrandtsen then filed an amended complaint in the District Court similar to the original except that it attacked, in addition to the Maritime Commission orders of January 2 and August 24, 1948, the Maritime Board's order of December 1, 1950, dismissing Isbrandtsen's complaint before the agency. The defendant carriers and the Maritime Board moved to dismiss the amended complaint. The United States, through the Antitrust Division of the Department of Justice, answered the amended complaint by confessing the Maritime Board's error. The Secretary of Agriculture intervened in support of Isbrandtsen.

The case was heard by three judges and the court on January 25, 1951, issued its opinion denying the motions to dismiss the amended complaint and determining that a permanent injunction

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should issue. This opinion was supplanted by a new opinion dated March 20, 1951 (Appendix "A" hereto annexed), on the basis of which the Court on March 21, 1951, entered its order dated March 20 from which this appeal is taken.

That order (1) set aside the order of the Maritime Board dated December 1, 1950 (but not the earlier orders of the Maritime Commission dated January 2 and August 24, 1948, approving the conference agreements), and (2) permanently enjoined the defendant carriers "from taking any steps to execute or effectuate, directly or indirectly, any contracts with shippers containing the contract/non-contract dual-rate system, pursuant to the contract/non-contract provisions of conference agreements No. 4490–6 and 7920–1 and heretofore proposed to be effectuated by said Defendants in the North Atlantic Trades, on November 1, 1948."

The Court's opinion relies solely upon the conclusion that the Board adopted its hearing examiner's finding No. 14, above quoted, to the effect that the spread between the contract and non-contract rates was arbitrary and therefore unjustly discriminatory—this despite the Board's own finding No. 3 to the contrary. The Court's opinion is a condemnation of a particular schedule of specific contract/non-contract conference freight rates which the Court found (by erroneously holding that the Board found) to involve

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an arbitrary spread. The Court's *order* proceeds far beyond its opinion by enjoining not merely the particular rate schedules which the opinion holds invalid, but, apparently, the entire *system* of contract/non-contract rates.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This is a case of first impression as to the power of the Federal Maritime Board to *authorize* the use of the contract rate system. This court held in *Swayne & Hoyt* v. *U. S.*, 300 U. S. 297, that the Shipping Board Bureau (a predecessor agency) had power to *prohibit* the system where a finding had been made on substantial evidence that the system was undesirable in a particular trade. In that case, the Court said (300 U. S., at 304):

> Whether a discrimination in rates or services of a carrier is undue or unreasonable has always been regarded as peculiarly a question committed the judgment of the administrative body, based upon an appreciation of all the facts and circumstances affecting the traffic [citing cases].

Swayne & Hoyt involved *domestic* trade, with respect to which the Government possessed power to prescribe maximum and minimum rates under the Intercoastal Shipping Act (46 U. S. C. 845 (a))—powers not explicitly conferred with respect to rates in foreign commerce. Having in mind such maximum and minimum rate powers

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as applied to the trade in question, the Court said (p. 304):

> In determining whether the present discrimination was undue or unreasonable the Secretary was called upon to ascertain whether its effect was to exclude other carriers from the traffic, and if so, whether, as appellants urge, it operated to secure stability of rates with consequent stability of service, and, *so far as either effect was found to ensue, to weigh the disadvantages of the former against the advantages of the latter.* This was clearly recognized in the report upon which the present order is based. It states that the danger of cut-throat competition was lessened by § 3 of the Intercoastal Shipping Act of 1933, and that the contract system tends to create a monopoly. In view of the assurance of reasonable rate stability afforded by the Act of 1933, the Secretary concluded that this was the real purpose of the contract rate.

This language clearly suggests that in trades in *foreign* commerce, where the government's rate-regulating powers are much less certain than in domestic, the contract rate system is an approvable measure "to secure stability of rates and consequent stability of service." The opinion also implies (p. 300, note 3) that section 14 of

the Shipping Act [3] is not to be read as a negation of the Board's power to approve the system—a view with which the District Court in the instant case seemed to agree in its opinion allowing the temporary injunction (81 F. Supp. 544, 546, app. dis. 336 U. S. 541).

In conformance with this interpretation of the law, the Maritime Board approved the contract/non-contract rate authorizations in defendants' conference agreements, as its predecessors had frequently (but not invariably) approved similar provisions in the past. Plaintiff challenges the Board's interpretation of the law, including its views as to the meaning of *Swayne & Hoyt*, plaintiff's position being that by virtue of section 14 Third of the Shipping Act, the contract rate system is illegal on its face and never subject to approval even under the broad powers conferred by section 15;[4] and that if section 15

[3] "Sec. 14. That no common carrier by water shall . . .

* * * * *

"Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason."

[4] Under section 15 (see Appendix B), common carriers by water must file with the Board for its approval agreements fixing rates, preventing or destroying competition, providing for exclusive, preferential or cooperative working arrangements, etc. The Board "may" disapprove agreements (among others) found to be "unjustly discriminatory

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does purport to authorize such approval, it is unconstitutional.

The Board's power of approval was the only issue tendered by the pleadings, and the only issue litigated in the District Court. It is an issue of great importance and serious public interest, reaching well beyond the interests of the private parties to this litigation, since the exclusive patronage system is employed by many conferences subject to the Board's jurisdiction and directly affects the conditions under which a large part of the world-wide foreign commerce of the United States is conducted. The terms of the District Court's opinion and final order are such that the Maritime Board is in doubt as to the status of the many conference agreements heretofore approved and presently in force providing for the exclusive contract system; and as to the course it may lawfully pursue in passing upon similar agreements in the future.

The substance of the District Court's opinion is that the spread between defendant's proposed contract and non-contract rates was "arbitrary". As previously indicated, the Board made no such finding, and its failure to do so can scarcely be interpreted otherwise than as a rejection of the

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or unfair", detrimental to the commerce of the United States, or violative of the Act, and "shall" approve all others. Agreements approved under section 15 are excepted from the antitrust laws. Violation of section 15 is punishable by a civil penalty of $1,000 a day.

examiner's finding to that effect.[5] Moreover, the Court's opinion, turning on the single word "arbitrary," passes over the issues tendered by the parties (a practice condemned in *Hormel* v. *Helvering*, 312 U. S. 552, 556) and transmutes the decision into a play on words that results in what we believe to be an unsupportable rule of law that may have serious consequences in many situations unrelated to this case.

The examiner's recommended finding was based upon the following testimony of the conference Chairman:

> Q. . . . I also understand that generally the non-contract rates were fixed at a differential of approximately 20 per cent above the contract rates?
>
> A. That is correct.
>
> Q. And I am asking you whether in your judgment the fixing of any rate scale at any time on a differential basis is a reasonable method of making rates?

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[5] The Court attributed the finding to the Board by this reasoning:

"The Board did not in precise terms adopt this finding. But, in oral argument before the court, counsel for the Board construed its decision as accepting the examiner's findings in so far as they were not inconsistent with its own report. There is nothing in the Board's report inconsistent with this finding of the examiner. Accordingly, we conclude that the Board made this finding its own."

It is remarkable that the finding should have been imputed to the Board on grounds of consistency (particularly in the light of the Board's finding No. 3) when such "consistency" invalidates the Board's decision.

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> A. I don't think the making of rates by differential is a proper basis, for that is an arbitrary basis.

This testimony followed a passage in which the same witness had criticized plaintiff's rates on the ground that they were established on the basis of a differential below conference rates. The witness' answer to the question may be construed (and presumably was construed by the Board) as an expression of his personal preference against rate making by differential. It can hardly be taken as adding or subtracting anything of substance to or from the case, which would have been precisely the same case even if the questions above quoted had not been asked, and regardless of what the witness answered.

In any event, the Board was entitled to evaluate this evidentiary fragment in its proper context in a record of over 1,500 pages. Whatever inference the District Court may have drawn (in its effort to avoid decision of the main issue), it "is faced with the difficulty that the Commission did not think the inference permissible, and so declined to make it". *I. C. C.* v. *U. S.*, 289 U. S. 385, 393. The Board's orders are required to be made after "full hearing" (Shipping Act, sec. 23, 46 U. S. C. 822) and, as stated in *North Carolina* v. *U. S.*, 325 U. S. 507, 512:

> If Congress intended to permit such an oversimplified form of proof to establish "unjust discrimination," then its require-

> ment of a "full hearing" was mere surplusage.

and it follows that "the court below, in substituting its judgment as to the existence of preference for that of the Commission on the ground that where there was no dispute as to the facts it had a right to do so, obviously exerted an authority not conferred upon it by the statute." (*U. S.* v. *Louis. & Nash. R. R. Co.*, 235 U. S. 314, 320). In the same case (p. 320), the Court said:

> It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed. *East Tenn. & Ry. Co.* v. *Interstate Com. Com.*, 181 U. S., 1, 23–29. And the amendments by which it came to pass that the findings of the Commission were made not merely *prima facie* but conclusively correct in case of judicial review, except to the extent pointed out in the *Illinois Central*, and other cases, *supra*, show the progressive evolution of the legislative purpose and the inevitable conflict which exists between giving that purpose effect and upholding the view of the statute taken by the court below. It cannot be otherwise since if the view of the statute upheld below be sustained, the Commission would become but a mere in-

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strument for the purpose of taking testimony to be submitted to the courts for their ultimate action.

In holding that a rate "arbitrarily" adopted is unlawful, the District Court confuses the process by which rates are made, with the rates themselves. A carrier is fully entitled to make rates by any means it chooses, and its rates, however made, must be approved if they fall within the "zone of reasonableness" (*U. S.* v. *Chicago etc. Ry. Co.*, 294 U. S. 499, 506) and are not otherwise *inherently* unlawful.

"A carrier is entitled to initiate rates and, in this connection, to adopt such policy of rate-making as to it seems wise." *U. S.* v. *Illinois Central R. R.*, 263 U. S. 515, 522. In the case of a rate attacked for unlawful discrimination, "What is unlawful in the action of the carriers inheres in its discriminatory quality, and not in anything else." *I. C. C.* v *U. S.*, 289 U. S. 385, 389. "The method used to make rates is of no importance if it is practicable and the resulting rates are lawful." *Danville Chamber of Commerce* v. *B. & O. R. R. Co.*, 255 I. C. C. 108, 115.

In other words, an inquiry pertaining to the validity of a rate must be addressed to the propriety of the *rate itself*—not to the process by which the rate was determined. Accordingly, it makes no difference whether the rates of defendant carriers were determined arbitrarily or other-

wise.[6] The question is whether the rates as determined are lawful. That was the issue, and the only issue, presented to the Court below.

The District Court's opinion is an invitation to the defendant carriers to republish the same (or perhaps different) contract and non-contract rates and to attempt their justification in testimonial terms that avoid the word "arbitrary." A decision which thus reduces the rate-making and rate-justifying process to an exercise in semantics is one that exalts form at the cost of substance and confuses an important field of public law. It ties the Board's powers to the question *not* whether the defendant carriers have engaged in a permissible practice, but whether their witness has used a permissible adjective.

CONCLUSION

The Shipping Act has been the basic regulatory statute affecting common carriage in ocean commerce since 1916. During 35 years of regulation under the Act, the steamship conference has been recognized as an important maritime institution through which the United States is enabled to control the terms of public service by ocean car-

[6] Mr. Isbrandtsen, plaintiff's president, when asked in the Maritime Commission proceeding how he made his rates, answered:

"Find the needs of the trade. How do Macy's make their rates? How do Macy's make their prices? They put a price tag on. That is what I do."

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riers in foreign commerce, many of whom are not subject to effective regulation in any other way. The Maritime Board obtains its power over conference carriers through its right conferred by section 15 to cancel the conference privilege and thereby subject conference steamship lines to the restraints and penalties of the antitrust laws.

The Maritime Board and its predecessors have been of opinion that the conference system of ocean transport is beneficial to the commerce of the United States, and that the contract rate system is, in many instances, essential to the promotion of effective conferences.

It is surprising that while the contract rate system has been subject to administrative challenge in many instances, its legality under the Shipping Act has never been passed upon by a court except in the present litigation.[7] The public interest in securing an adjudication as to the lawfulness of the system is apparent, and is underscored by the fact that two federal departments (Justice and Agriculture) are contesting the Board's interpretation of the Shipping Act in this litigation. Accordingly, we believe that there can be no doubt as to the substantiality of

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[7] The system, however, was lawful at common law (See *Mogul S. S. Co.* v. *McGregor*, 17 App. Cas. 25; *Lough* v. *Outerbridge*, 143 N. Y. 271. A civil suit attacking the system under the antitrust laws is pending in the District Court for the District of New Jersey (*U. S.* v. *Far East Conference*, Civil No. 11546.)

the questions involved, or as to the necessity for full review by this Court of the issues which the case presents.

Respectfully submitted.

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WASHINGTON 25, D. C., *May 16, 1951.*

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